

1 Michael Yesk (SB#130056)
2 Megan Dailey (SB#221574)
3 70 Doray Drive, Suite 16
4 Pleasant Hill, CA 94523
5 925-849-5525
6 m.yesk@att.net
7 Attorneys for Plaintiffs

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

NUMA BARNES, AN INDIVIDUAL,) Case: 3:13-cv-03227-EDL
PLAINTIFF,)
VS.) MEMORANDUM OF POINTS AND AUTHORITIES
) IN SUPPORT OF MOTION FOR TEMPORARY
) RESTRAINING ORDER AND ORDER TO SHOW
) CAUSE WHY PRELIMINARY INJUNCTION
) SHOULD NOT ISSUE AND FOR PRELIMINARY
) INJUNCTION
HOMEWARD RESIDENTIAL, INC.; DEUTSCHE)
BANK NATIONAL TRUST COMPANY; MORTGAGE)
ELECTRONIC REGISTRATION SYSTEMS,) DATE: July 23, 2013
INC.; POWER DEFAULT SERVICES, INC.;) TIME: 9:00 am
FIDELITY NATIONAL TITLE COMPANY; AND) CTRM: E, 15th Floor
DOES 1 THROUGH 100, INCLUSIVE,)
DEFENDANTS.)
Hon. Judge Elizabeth D. Laporte

Plaintiff moves for a temporary restraining order and a preliminary injunction enjoining Defendants, and their agents, assigns, and/or transferees, from completing a foreclosure sale on Plaintiffs' residential property, encumbering or transferring any right, title, or interest in the property, or taking any other enforcement actions pending trial in this matter, pursuant to Fed.R.Civ.P. 65, and Local Rule 65-2.

Plaintiff desires to present oral testimony at the hearing, and anticipate that one (1) hour will be required for the hearing.

FACTS

Plaintiff NUMA BARNES, AN INDIVIDUAL ("Plaintiff") is allegedly the Trustor/Borrower on that certain Deed of Trust recorded on or about August 16, 2006 as Instrument No. 259052 in of Official Records in the Office of the Recorder of Contra Costa County, California, purportedly putting a lien on the real property located at 30 Vernal Court, Alamo, CA 94507, APN No. 192-360-003-3 (the "Property").

Defendant Homeward Residential, Inc. ("Homeward") claims to be the servicer for the Plaintiffs' loan. In fact, Homeward could not have been assigned any interest as Servicer through the Pooling and Servicing Agreement due to the failure to properly assign the beneficial interest in Plaintiff's Deed of Trust to Deutsche Bank National Trust Company ("DBNTC") as Trustee. Homeward could not be acting on behalf of the trustee for the certificate holders of the securitized trust because they never acceded to the beneficial interest due to the violation of the Pooling and Servicing Agreement for the securitized trust, and therefore could not contractually assign servicing.

Fidelity National Title Company ("Fidelity") is now foreclosing on Plaintiff's Property without instruction from the certificate holders of the Trust, as the only beneficiaries with the legal right to act.

Securitization is the act of producing an investment vehicle of Mortgage-Backed Securities ("MBS") using the Borrower's Mortgage NOTE as the underlying corpus, as collateral. In each and every securitized loan produced by these Banking Institutions, certain documents are filed with the Securities and Exchange Commission which are mandated, including but not limited to the Pooling and Servicing Agreement, Prospectus, Indenture, 10-K [yearly report], 10-Q [quarterly report], 8-K [current report] Form 15-D and

1 the Servicing Agreements]. The problem is that the original note does not
 2 have the endorsements in "wet ink" on the note. However, for there to be a
 3 valid assignment, there must be more than just assignment of the deed alone;
 4 the note must also be assigned. See *Carpenter v. Longan*, 83 U.S. 271, 274,
 5 21 L. Ed. 313 (1872) (stating that "[t]he note and mortgage are inseparable;
 6 the former as essential, the latter as an incident"; adding that "[a]n
 7 assignment of the note carries the mortgage with it, while an assignment of
 8 the latter alone is a nullity"); *In re Leisure Time Sports, Inc.* 194 B.R.
 9 859, 861 (9th Cir. 1996) (stating that "[a] security interest cannot exist,
 10 much less be transferred, independent from the obligation which it secures"
 11 and that, "[i]f the debt is not transferred, neither is the security
 12 interest"); *Kelley v. Upshaw*, 39 Cal. 2d 179, 192, 246 P.2d 23 (1952)
 13 (stating that assigning only the deed without a transfer of the promissory
 14 note is completely ineffective); see also RESTATEMENT (3D) OF PROPERTY (MORTGAGES) §
 15 5.4 (stating that "[a] mortgage may be enforced only by, or in behalf of, a
 16 person who is entitled to enforce the obligation that the mortgage secures")
 17 (emphasis added). As *Kelley* establishes, this is true under California law
 18 which presumably applies here.

19 The actual lenders in this case, the individuals who invested in the
 20 securitized note, have not been consulted as to a loan modification,
 21 foreclosure or settlement. Defendant Homeward has repeatedly misrepresented
 22 to Plaintiff that they had communicated with the "investor," and the
 23 "investor" would not accept a loan modification requested by Plaintiffs. In
 24 fact, Defendant Homeward failed to communicate with anyone representing the
 25 actual investors, and committed fraud on both the Plaintiff and the actual
 26 investors when they claimed to have done so.

1 A true and correct copy of Plaintiff's Mortgage Securitization Audit &
2 Analysis Report is attached to the Complaint as Exhibit "A," and incorporated
3 herein by this reference. See Doc. No. 1, Ex. A (p. 28). Defendants, and
4 each of them, failed to endorse the note and assign the deed of trust in a
5 timely manner violating 15 U.S.C § 1641(g), and failed to properly identify
6 the true party of interest in their foreclosure action.

7 Defendants or their purported predecessors in interest at the time of
8 origination committed violations of TILA at the time of origination due to
9 deficiencies in foreclosures including fully informing home buyers of the
10 pros and cons of adjustable rate mortgages in a language (both written and
11 spoken) that they can understand and comprehend; and advising them to compare
12 similar loan products with other lenders. It also requires the lender to
13 offer other loan products that might be more advantageous for the borrower
14 under the same qualifying matrix. Defendants also failed to provide notice
15 to borrowers of assignment at the time of 30 days of transfer of ownership
16 interest or in compliance with TILA at the time of the Assignment of Deed of
17 Trust recorded by MERS in favor of DBNTC as Trustee on October 20, 2011 in
18 violation of TILA. See 15 U.S.C § 1641(g). In other words, Plaintiff's
19 claim in the TILA cause of action does not arise out of or on the date
20 complained of document was recorded, and is not necessarily integrated with
21 foreclosure. However, Plaintiff also alleged claims for wrongful foreclosure
22 in the Complaint.

23 Federal Rules of Civil Procedure, Rule 65 allows a Court to grant a
24 temporary restraining order where justice requires to avoid irreparable
25 injury. Rule 65(b) of the Federal Rules of Civil Procedure governs the
26 issuance of temporary restraining orders. Pursuant to Rule 65(b), the Court

1 must look to the specific facts shown by affidavit(s) to determine whether
 2 immediate and irreparable injury, loss, or damage will result to the
 3 applicant. In determining whether to issue injunctive relief, the Court is
 4 required to consider "(1) the threat of irreparable harm to the moving party;
 5 (2) the movant's likelihood of success on the merits; (3) the balance between
 6 the harm to the movant if the injunction is denied and the harm to other
 7 parties if the injunction is granted; and (4) the public interest." *Bandag, Inc.* v. *Jack's Tire & Oil, Inc.*, 190 F.3d 924, 926 (8th Cir. 1999) (citing *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc)). The burden of establishing the necessity of a temporary restraining
 11 order or a preliminary injunction is on the movant. *Baker Elec. Coop., Inc.* v. *Chaske*, 28 F.3d 1466, 1472 (8th Cir. 1994).

13 "No single factor in itself is dispositive; in each case all of the
 14 factors must be considered to determine whether on balance they weigh towards
 15 granting the injunction." *Id.* (quoting *Calvin Klein Cosmetics Corp. v. Lenox Laboratories, Inc.*, 815 F.2d 500, 503 (8th Cir. 1987)

17 Plaintiff here is entitled to permanent injunctive relief based upon
 18 the causes of action alleged herein. Given the drastic implications of
 19 foreclosure, it is not surprising to find courts quite frequently granting
 20 preliminary injunctions to forestall this remedy while the court considers a
 21 case testing whether the foreclosure is justified under the facts and the
 22 law. *Baypoint Mortgage Corp. v. Crest Premium Real Estate Trust* (1985) 168
 23 Cal.App.3d. 818, *see also Bisno v. Sax* 175 Cal.App.2d 714.

24 In the case of a contract for the transfer of land, or an interest in
 25 land, it is presumed that damages would not adequately compensate. The
 26 plaintiff need not establish inadequacy of the legal remedy in the particular

1 case; historically, land is treated as unique. This is a presumption. The
 2 presumption is conclusive as to owner occupied properties. As to other
 3 properties, the presumption is one affecting the burden of proof. (See Civil
 4 Code § 3387; see *Remmers v. Ciciliot* (1943) 59 C.A.2d 113, 119, 138 P.2d 306;
 5 *Fleishman v. Woods* (1901) 135 C. 256, 261, 67 P. 276; *Pike v. Hayden* (1950)
 6 97 C.A.2d 606, 612, 218 P.2d 578 [agreement to lease service station and
 7 cafe]; *Ellison v. Ventura Port Dist.* (1978) 80 C.A.3d 574, 579, 145 C.R. 665,
 8 citing the text; *Abadjian v. Superior Court* (1985) 168 C.A.3d 363, 374, 214
 9 C.R. 234. Plaintiffs' properties are not owner occupied. Under the Civil
 10 Code and supporting case law the burden shifts to Defendants to show there is
 11 no inadequacy of damages as a remedy in this matter, and that Plaintiffs'
 12 will not suffer irreparable harm if the foreclosure is completed. This will
 13 be difficult given the problems with obtaining financing post-foreclosure.

14 There is a likelihood of Plaintiff prevailing on the merits and if the
 15 foreclosure is not prevented, Plaintiff will lose her property. A
 16 foreclosure sale is currently set for July 29, 2013 of the property located
 17 at 30 Vernal Court, Alamo, CA 94507. Such damage is irreparable and cannot
 18 be adequately compensated by financial means.

19 WHEREFORE, Plaintiff prays for relief as follows:

20 1. For a temporary restraining order and preliminary injunction enjoining
 21 said defendants, and each of them, and their agents, assigns and/or
 22 transferees, from completing the foreclosure on the Property, encumbering or
 23 transferring any right, title, or interest in the Property, or taking any
 24 other enforcement actions;

25 2. For such other and further relief as the court may deem proper.

26

DATED: July 20, 2013

Respectfully submitted,

/s/ Megan Dailey
Megan Dailey, Attorney for Plaintiffs
Yesk Law
70 Doray Drive, Suite 16
Pleasant Hill, CA 94523
925-849-5525